IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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The case presents the question of the authority of the Secretary of Commerce ("Secretary") under the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101 *et seq.* (1976) ("the Act") to amend a construction differential subsidy ("CDS") contract by deleting domestic trade restrictions in consideration for full subsidy repayment. The briefs previously filed by the petitioners and the federal parties explain that the Secretary, as the official charged with the

statute's execution, has long construed the Act to extend the disputed authority, and that Congress has knowingly affirmed that consistent departmental interpretation. Our principal briefs additionally demonstrate the reasonableness of the agency construction in light of the broad contractual authority extended the Secretary by the Act, the congressional intent behind the statute, and the fundamental purposes and policies of the Act.

The deference due a long-standing agency interpretation of its statutory powers, approved by Congress and supported by the normal aids to statutory construction, is formidable. Respondents Shell Oil Company ("Shell") and Alaska Bulk Carriers, Inc. and Trinidad Corporation (hereinafter collectively referred to as "Alaska Bulk") thus struggle to create the "compelling indications" of error necessary to reject that agency view. *See E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). To that end, they seek to undermine both the agency's historic interpretation of its authority and Congress' ratification of that view, to insert into the Act a prohibition that it does not and was never intended to contain, and to rewrite the Act's purposes and policies. Their efforts are unpersuasive, as we explain below.

ARGUMENT

I

Alaska Bulk's Counterstatement purports to tell the "real story" of the STUYVESANT's construction by resort to its interpretation of two isolated 1970 interagency memoranda. (Alaska Bulk Brief at 6-11.) In so doing, Alaska Bulk casts as established fact matters that were disputed and never resolved below, and that are wholly irrelevant to the legal issues before this Court. Neither the district court nor the court of appeals decided any facts relating to the agency's decision to subsidize the STUYVESANT's construction.

The two documents upon which Alaska Bulk relies were placed in the trial court record under an affidavit of its counsel that merely identified them by name and source. (App. at 387.) Those documents were revelant, if at all, to an early challenge made by the plaintiffs to the good faith of the Secretary's 1977 decision. That challenge was expressly reserved by the trial court's original decision on the cross motions for summary judgment on the grounds that "material facts remain in dispute with respect to plaintiffs' allegations concerning the pre-1977 actions of the Secretary." (Pet. App. at 90a.) Alaska Bulk is correct that the record does not set forth the full history of the early agency decisionmaking, but its suggestion that the failure is significant is astonishing. The facts and law relevant to the remaining claim were never fully presented to or resolved by the

district court because, rather than litigate the issue, Alaska Bulk (later joined by Shell) successfully moved for its dismissal before filing its appeal. (*See* App. at 558-559; Rec. Doc. 42, Mtn. for Amendment of Order and Other Relief; Transcript of Proc. of Nov. 30, 1977 at 2, 8-11.) The respondent's blatant attempt to bootstrap its tenuous legal position here, through resort to disputed facts relevant at best to a claim that it expressly abandoned below, is decidedly improper.

II

The respondents' position that the Merchant Marine Act, 1936 mandates the continuation of domestic trade restrictions on a CDS-built vessel, *even after the subsidy benefit that prompted their imposition has been returned,* is neither logically nor legally persuasive. The voluminous briefs submitted by the respondents cannot undermine the simple principles that (1) § 506 was designed only to assure fair competition between subsidized and unsubsidized vessels in the domestic trade, and (2) a vessel that has remitted its subsidy no longer poses the competitive evil that § 506 addresses. While apparently outside the grasp of the respondents, the critical distinction between a vessel that retains its subsidy and a vessel that returns its subsidy was understood and recognized by Congress and the Department of Commerce. Indeed, the significance of that distinction explains the Act's extension to the Secretary of the amendatory authority at issue in this case.

A. The Administrative Construction and Congressional Approval

The Secretary's 1977 decision to release permanently domestic trade restrictions on the STUYVESANT in exchange for full subsidy repayment comported with a reasoned, long standing and publicly-known administrative interpretation of her contractual powers under the Act. In response to Grace Line's 1964 application, the agency and the Comptroller General analyzed the statute, its history and its policy goals and found them compatible with permanent trade restriction release upon full CDS repayment. Since 1964, the agency has been on the record for the considered view that (1) § 506 poses no barrier to the challenged action, (2) full subsidy repayment creates the parity intended by the Act, and (3) the exercise of the amendatory authority is within the Secretary's discretion. (*See* Pet. Brief at 51-54; Gov't Brief at 64-66; App. at 172-180, 350-358.)

That administrative construction of the Secretary's powers under the Act had not lain dormant during the intervening years. It had instead been exercised by the Secretary on three other occasions (*id.* at 54-60; Gov't Brief at 66), brought to the attention of Congress by the industry and the Department of Commerce, and explicitly recognized and approved by Congress in the 1972 amendments to the Act (*id.* at 61-67, 72-73; Gov't Brief at 67-69). Subsequently, in amending the Act in 1978, Congress again con-

firmed the availability of unrestricted domestic trade in exchange for CDS repayment. (*See* Gov't Brief at 70-71.)

The substantial deference due this concert of administrative and congressional action has been well-established by the decisions of this Court. *See, e.g., Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain [an agency's] application of [a] statutory term, [the Court] need not find that its construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings.'

Udall v. *Tallman*, 380 U.S. 1, 16 (1965), *quoting Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction . . . [and] ratified it with positive legislation." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969). *See also Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *United States* v. *Correll*, 389 U.S. 299 (1967).

Cognizant of their burden, respondents Alaska Bulk and Shell endeavor to belittle the administrative and congressional agreement on this issue. Their quibbles with the longevity and consistency of the *Grace Line* interpretation warrant little response: The Secretary's reasoned understanding of her permanent release authority has remained unchanged, and repeatedly been reaffirmed, since the first request for its exercise in 1964. (Pet. Brief at 54-60; Gov't Brief at 65-66.) Alaska Bulk's attempt to displace the administrative interpretation of the statute by characterizing the 1977 STUYVESANT decision as an *ad hoc* and unprincipled agency response to exigent circumstances is misdirected. (Alaska Bulk Brief at 95-101.) The brief's liberal use of strong adjectives cannot alter the basic fact that the agency's studied view of the relevant authority preceded by more than a decade the STUYVESANT's request for release from trade restrictions in exchange for full subsidy repayment. The *Grace Line* decisions set forth the agency's legal view of its statutory powers;[1] the re-

[1] Alaska Bulk's argument that the *Grace Line* analysis and the government's current position are inconsistent is simply incorrect. In both contexts, the government's review of the language, history and purposes of the Act led it to the conclusion that § 506 is fully consistent with the Secretary's amendatory actions. *Grace Line* is bottomed on the legal premise that full subsidy repayment creates the parity intended by the Act and thus renders inapplicable the § 506 limitations on joint foreign and domestic trading, and temporary domestic trading, by subsidized vessels. The government's position remains unchanged.

quest that the permanent release authority be exercised in connection with the STUYVESANT mandated only a policy determination whether to exercise that discretionary authority in this case. Alaska Bulk's effort to disassociate the Secretary's 1977 STUYVESANT decision from its historic context is thus unavailing.

Neither respondent can undermine the clearly established precedent for the 1977 amendment of the STUYVESANT's contract. They therefore join in an effort to minimize the importance of Congress' subsequent acceptance of the *Grace Line* precedent. Their first line of argument, which denies the 1972 congressional ratification of *Grace Line*, is unfounded.

In 1972, Congress amended § 1104(a)(3) of the Act to make federal financing guarantees available for the repayment "of any amount of construction-differential subsidy. . . ." Pub. L. 92-507, 86 Stat. 909 (1972). The legislative history of that amendment explains that the section's reference to "any amount" includes both partial CDS repayments made under § 506 and full CDS repayment made in order to obtain permanent trade restriction release. (*See* Pet. Brief at 61-66; Gov't Brief at 67-69.) The report of the House Merchant Marine and Fisheries Committee, the relevant sections of which are set forth in full in our original brief, explains that Congress had initially contemplated extending such guarantees only for "unusual" CDS repayments like that involved in *Grace Line*, as indicated by the section proposed in

the original bill. However, in apparent response to views expressed by the Department of Commerce, Congress elected to broaden the provision "to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act." H.R. Rep. No. 688, 92d Cong., 1st Sess. 9-10, 17 (1971).

That discussion unmistakably evinces Congress' awareness of the *Grace Line* precedent. The respondents' argument that Congress' broadening of the language somehow constituted a rejection or questioning of that precedent misses the mark. Apprised of the agency's view of its statutory powers, Congress evidenced no doubt whatsoever concerning the correctness of that view. Rather, it passed legislation that not only incorporated the agency understanding but also facilitated the exercise of the very power analyzed in *Grace Line* and challenged in this case. Since the 1972 amendment, federal financing guarantees have been available to an owner who, as here, repays the government subsidy in order to obtain permanent trade restriction release. The evidence of congressional affirmation of *Grace Line* is overwhelming.[2]

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[2] Alaska Bulk's argument that other statutes enacted by Congress evince a different understanding is spurious. The brief cites two wartime statutes that authorized the domestic operation of CDS vessels under unique circumstances and *in the absence of any CDS repayment.* The Relief Act of 1940, 46 U.S.C. § 1242(a), authorized the unilateral suspension of

To avoid the persuasive weight due Congress' approval of *Grace Line*, Shell and—to a lesser extent—Alaska Bulk rely heavily upon three decisions in which this Court refused arguments that Congress had ratified a statutory construction urged by the losing parties—*Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Securities and Exchange Comm'n* v. *Sloan*, 436 U.S. 103 (1978). The discussion in our principal briefs, as amplified by responsive discussion below, demonstrates the inapplicability of these three cases to the instant controversy.

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trade restrictions on CDS vessels to avoid sacrificing shipping companies that owned or operated subsidized vessels barred from foreign trade by the Neutrality Act of 1939, and to assure the maintenance of the vessels in the event they were needed for the national defense. *See* H.R. Rep. No. 2486, 76th Cong., 3d Sess. 1 (1940); S. Rep. No. 1714, 76th Cong., 3d Sess. 4 (1940). Similarly, to facilitate the sale of surplus war-built vessels and assist the post-war revitalization of the American merchant marine, the Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1742(d), *repealed*, Pub. L. 94-412, 90 Stat. 1258 (1976), authorized the government to sell a group of United States-built vessels at a price roughly equal to foreign construction cost without imposing any domestic trade restrictions on the ships, and to lift unilaterally trade restrictions to which parties who had previously purchased such war-built vessels had agreed. *See* H.R. Rep. No. 831, 79th Cong., 1st Sess. 2-3 (1945); S. Rep. No. 807, 79th Cong., 1st Sess. 1-2 (1945). The statutes thus addressed a problem totally unrelated to the Secretary's authority to release domestic trade restrictions in exchange for CDS repayment.

The relevance of the pending "Omnibus Maritime Bill" is discussed *infra* at 24-25 n.10.

In *TVA* v. *Hill*, *supra*, this Court held that Congress' continued appropriation of funds to the Tellico Dam project was insufficient to repeal by implication the "abundantly clear" prohibition of the statute's plain language and detailed legislative history. 437 U.S. at 184. The instant case, unlike *TVA* v. *Hill*, involves an agency interpretation that is consistent with the language of the Act, comports with the demonstrable intent of the enacting Congress, was explicitly approved by a congressional committee with jurisdiction over the subject matter, and served as the basis for a statutory amendment enacted by Congress.

In *International Brotherhood of Teamsters* v. *United States*, *supra*, this Court afforded "little, if any weight" to a general unfocused expression of intent by a later Congress that flatly contradicted the unambiguous intent of the enacting Congress. 431 U.S. at 354 n.39. This case, unlike *Teamsters*, presents a situation in which the expressed intent of the enacting Congress is consistent with a later Congress' approval of an interim statutory construction.

In *SEC* v. *Sloan*, *supra*, this Court found that later indications of congressional awareness and approval provided an insufficient basis to countenance an agency construction unknown to the statute's drafters that "would result in a construction of a statute which is not only at odds with the language of the section in question, and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammeled and unreviewable

power it would vest in a regulatory agency." 436 U.S. at 121. However, because this case does not present an agency construction that circumvents fundamental statutory policy or raises due process concerns, it merits the full recognition of later congressional approval that the Court withheld in *Sloan*.

B. The Language of the Act

The principal briefs filed by the petitioners and the Government explain that the broad contractual powers afforded the Secretary under the Act, and particularly by §§ 504 and 207, amply authorize her 1977 STUYVESANT decision. (Pet. Brief at 20-24; Gov't Brief at 49-51.) The respondents' counter-arguments are more puzzling than persuasive.

First, both parties suggest that § 504's proviso that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law" argues in their favor. (Shell Brief at 28-29; Alaska Bulk Brief at 93-95.) However, since no provision of the Act mandates restricting the domestic trade opportunities of a vessel that has repaid its subsidy, the quoted phrase of § 504 instead plainly supports the Secretary's decision to delete the restrictions by contract amendment. Second, both respondents dispute the relevancy of § 207 to the authority at issue here. To the extent that we understand their arguments,[3] the respondents appear

[3] We confess that Alaska Bulk's argument on this point is to us unintelligible. (Alaska Bulk Brief at 88-93.) Their brief appears to argue that (1) § 207 provides the government with contractual powers like those possessed by private corporations, (2) private corporations have no power to take governmental action, and (3) the government therefore has no power to take governmental action. In response, we point out, first, that the apparent intent of § 207 was to supplement extant governmental powers with all normative commercial powers, and, second, that a contract amendment for consideration like that at issue here would plainly fall within such corporate powers.

to contend that § 207 does not grant the Secretary powers "to protect, preserve or improve the collateral held by the Commission or Secretary to secure indebtedness" that are otherwise denied by the Act. (Shell Brief at 29-30.) We respectfully submit that that the argument begs the pivotal question in this case.

The respondents' central argument is that § 506 on its face prohibits the Secretary's challenged action. The sheer length of the respondents' briefs belies, and an analysis of § 506 disproves, the validity of that claim. No matter how the words and phrases of the section are parsed, the language of § 506 is inadequate for the task that the respondents assign to it. Certainly § 506 sets forth the contractual agreement required of the CDS recipient as a condition of the subsidy award, and circumscribes and conditions the opportunities of a subsidized vessel to engage in domestic trade. But one can study the language of § 506 in vain for any limitation upon the trading opportunities of a vessel that has remitted its subsidy to the government. Moreover, as our earlier briefs detailed, the logic of § 506 is fully consistent with

the Secretary's action: Since the trade restrictions are the *quid pro quo* for the subsidy payment, trade restriction release should naturally be the consideration for a CDS repayment. (*See* Pet. Brief at 24-29; Gov't Brief at 51-55.)

Respondents' contention that a recognition of the Secretary's repayment and release authority would nullify the restrictions of § 506 on temporary domestic trading by CDS vessels is erroneous. The argument proceeds from the assumption that the Secretary's authority to amend CDS contracts to remove trade restrictions upon CDS repayment must logically be accompanied by a power exercisable at the Secretary's discretion to reassert the trade restrictions and cancel the repayment obligation. Therefore, they conclude, the permanent release and repayment authority necessarily entails the availability of temporary, indefinite waivers at the Secretary's option, thus contravening the six month limitation on temporary waivers imposed by § 506. (Shell Brief at 24-26; Alaska Bulk Brief at 116-117.)

As Shell recognizes, the government has taken the position that it lacks authority to permit a vessel to reclaim CDS status following a repayment and release transaction. (Shell Brief at 25.) That position does not, as Shell asserts, demonstrate the "philosophical bankruptcy" of the government's position but instead the faulty premise of the respondents' argument. The authority to permit a repayment and re-

lease transaction does not, logically or necessarily, entail the authority to reverse the transaction at a subsequent date. For while the former runs afoul of no provision of § 506, a reversal of the transaction after one year or five years would—in fact if not in theory—permit a temporary transfer outside the scope of § 506. The government's position that it has the authority to permit permanent domestic trading for full CDS repayment or temporary trading in accord with § 506, but no intermediate authority to combine the two, demonstrates the compatibility of the action taken here with the provisions of § 506. The nullification argument thus presents a false issue.

Finally, the recognition of the singular focus of § 506 upon subsidized vessels, *i.e.*, vessels that retain the economic advantage of subsidized construction, exposes the weaknesses of the respondents' arguments that § 506 by implication forbids the Secretary's disputed actions. (Shell Brief at 23-27; Alaska Bulk Brief at 53-54.) The "general rule" prescribed by § 506, and the "express exceptions" contained therein, apply to a class that does not include a vessel that has remitted its subsidy. Given the extensive contractual authority otherwise granted the Secretary under the Act, the absence of any prohibition upon domestic trading by a vessel that has repaid its CDS strongly supports recognizing the amendatory authority at issue here. At the very most, the statute's failure to address the issue with specificity creates an ambiguity that makes imperative a consideration of

the Act's legislative and administrative history, and basic purposes and policies.

C. The Legislative History

There is no reasonable ground to dispute the intention of the original framers of the 1936 Act. The concept that full subsidy repayment would justify the agency's release of trade restrictions on a once-subsidized vessel remained constant from the Black Report's original outline of the construction subsidy program through the passage of the 1936 Act. While Alaska Bulk does not dispute this point (Alaska Bulk Brief at 58-61), Shell has recognized the importance of the issue and sought to contest it on two grounds here. We answer both below.

Petitioner's original brief tracked the history of the 1936 Act, cited multiple proposed bills, and quoted statements made by Senators Guffey and Black explaining the discretion of the agency to consent to permanent trade restriction release upon full sudsidy repayment. (Pet. Brief at 30-39; *see* Gov't Brief at 55-60.) Shell in response seeks to depict the comments of Senator Guffey from the floor as an isolated voice describing his peculiar understanding of his unique bill. (Shell Brief at 52-53.) The difficulty with Shell's argument is that (1) Senator Guffey's view echoed that advanced by Senator Black at the outset of the legislative process,[4] (2) the provision in

[4] *Compare* S. Rep. 898, 74th Cong., 1st Sess. 44 (1935) (Black statement) (quoted in Pet.'s Brief at 33) *with* Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 133 (1936) (Guffey statement) (quoted in Pet.'s Brief at 36-37).

the Guffey bill permitting trade restriction release upon full subsidy repayment finds a counterpart in every relevant bill proposed in either House of the Congress during the legislative process,[5] and (3) the essential terms of the Guffey bill and the 1936 Act

[5] The first bills introduced in the House and Senate envisioned that the agency would have the discretion to permit a vessel's permanent operation in the domestic trade in return for the owner's secured promise to repay, over the vessel's useful life, the full unamortized subsidy with interest on unpaid installments. *See* S. 2582, 74th Cong., 1st Sess. § 504 (April 15, 1935) (introduced by Senator Copeland, Chairman of Senate Commerce Committee); H.R. 7521, 74th Cong., 1st Sess. § 504 (April 15, 1935) (introduced by Representative Bland, Chairman of House Committee on Merchant Marine and Fisheries). Subsequent amendments, and alternative proposed bills, offered some variations on the conditions of permanent trade restriction release. Some, for example, proposed that full repayment occur prior to the vessel's permanent domestic operation. *See, e.g.*, S. 4110, 74th Cong., 2d Sess. § 27 (February 24, 1936) (introduced by Senator Guffey); S. 3500, 74th Cong., 2d Sess. § 506 (Committee Print, March 3, 1936). Some, including the version first passed by the House in 1935, conditioned permanent release upon a market need for the vessel in the domestic trade. *See, e.g.*, H.R. 8555, 74th Cong., 1st Sess. § 506 (May 13, 1935); S. 3500, 74th Cong., 2d Sess. § 506 (Committee Print, March 3, 1976). Some, also including the original House version, proposed empowering the agency to revoke its consent to domestic trade at any time. *See* H.R. 8555, *supra*. However, every comprehensive bill that research has disclosed concurs on the basic availability of permanent trade restriction release upon agency consent and full subsidy repayment.

are identical.[6] Those factors demonstrate that Senator Guffey can only properly be viewed as articulating the sentiment of the enacting Congress.

Second, Shell advances the extraordinary argument that certain amendments made in the bill between its House passage in 1935 and ultimate enactment in 1936 and were intended to and did deprive the Secretary of the permanent release authority that would otherwise have been extended (Shell Brief at 40-46). This contention is easily refuted by full analysis of the materials that Shell partially cites and by reference to the 1936 Act itself.

Section 506 as enacted by the House in 1935,[7] clearly authorized a CDS-built vessel to engage permanently in exclusive domestic trade in return for full subsidy repayment. Shell mistakenly points to Section 506(c) as the source of this authority, and argues that Section 506(c) was eliminated in 1936 as a result of Congress' disapproval of permanent trade restriction release. Actually, the authority for trade restriction release upon CDS repayment was contained in Section 506(b)(1) of the 1935 Act;[8] § 506(c) merely conditioned the exercise of the power on the existence of a market need for the vessel in domestic trade. And the permanent release authority described by § 506(b)(1) of the 1935 Act survived intact the amendments to § 506 that occurred in 1936.

The House bill did create some concern in the Senate, as the portion of the Senate Commerce Committee Report quoted by Shell and cited by the petitioners indicates. (*See* Shell Brief at 44-46; Pet. Brief at 34 & n.25.) But, contrary to Shell's assertions, that concern focused not upon permanent domestic operation accompanied by full subsidy remittance, but upon the vast opportunity for joint domestic and foreign trade permitted subsidized vessels by the House version of the bill. The 1935 Act presented a vehicle for abuse—§ 506(b)(1) and (2) allowed unlimited temporary domestic trading and joint foreign and coastwise trading by a vessel that retained its subsidy and repaid only a portion for the time spent or money earned in the domestic trade. Such joint foreign and coastwise trading, which allowed the subsidized vessels to skim the cream of the domestic trading crop, was precisely the abuse that the Black Report sought to redress.

[6] The bill proposed by Senator Guffey contemplated permanent trade restriction release upon the owner's receipt of agency consent and prior repayment in full of the unamortized subsidy. *See* S. 4110, *supra* n.5. The section as enacted in 1936 envisioned permanent trade restriction release upon the owner's receipt of agency consent and prior secured agreement to repay the unamortized subsidy in full, upon terms and conditions prescribed by the agency. *See* Pub. L. No. 74-835, § 506, 49 Stat. 1999 (1936). The only significant difference between the two versions of the section is the greater discretion afforded the agency over repayment terms in the enacted § 506.

[7] H.R. 8555, 74th Cong., 1st Sess. § 506 (May 13, 1935).

[8] Shell's partial quotation of the bill excluded §§ 506(b)(1) and (2). Because we deem those subsections essential to an understanding of the changes made between the enacted House bill and final statute, we have reprinted § 506 of this bill in full in the appendix to this brief.

The nature of Congress' concern is best reflected by its actions in 1936. Section 506, as ultimately enacted, explicitly sanctioned (1) limited varieties of joint foreign and domestic trading for which proportionate repayment was required,[9] (2) permanent release of domestic trade restrictions upon agency consent and the owner's promise to repay in full the vessel's unamortized subsidy, and (3) temporary domestic trading, limited to three months in the case of an emergency, for which no CDS repayment obligation was prescribed. Pub. L. No. 74-835, 49 Stat. 1985, 1999 (1936).

Thus, the bill that emerged from the Senate and was ultimately passed in 1936 curtailed rather dramatically the permissible domestic trading by CDS vessels while the vessels retained their subsidies, but left intact the explicit description of the agency's authority to sanction a vessel's permanent operation in the domestic fleet upon full subsidy repayment. Those facts, accompanied by the abolition of the requirement of need as a condition for permanent trade restriction release, demonstrate rather vividly Congress' clear recognition of the difference between the ship that retains and the ship that remits its subsidy. Temporary domestic trading, or joint domestic and foreign trading, by a subsidized vessel poses a potential for unfair competition with unsubsidized vessels

[9] Petitioner's citation of § 506 of the 1936 Act in its principal brief inadvertently excluded the last sentence of the provision which sets forth this repayment obligation. The section has been printed in full in the appendix of this brief.

that Congress ultimately sought to redress in the Act. However, a vessel that repays its subsidy in full no longer enjoys the troublesome economic advantage and can thus fairly compete without restriction in the domestic trade. That recognition was plainly central to the consideration of this issue throughout the legislative process that culminated in the 1936 Act.

D. The 1938 Legislative History

The history of § 506 admittedly becomes confused with the 1938 amendment: At that time, the language that described the Secretary's repayment and release authority was deleted during the course of an amendment that was intended to work no fundamental change in the original purpose of the section. *See* Pub. L. No. 75-705, § 18, 52 Stat. 958 (1938). The respondents contend that the deletion of this language evinces a congressional intent to deny the Secretary the authority to release permanently domestic trade restrictions in exchange for CDS repayment. (Shell Brief at 47-50; Alaska Bulk Brief at 61-73.) The strength of the contention is sapped by two unavoidable facts. First, a congressional decision to withdraw the authority so consciously extended in 1936 would necessarily have constituted the change in the section's original purposes that Congress disavowed. *See* H.R. Rep. No. 2168, 75th Cong., 3d Sess. at 21 (1938). Second, and more important, the contemporaneous legislative history provides no indication that the authority for permanent trade restriction release was considered, much less eliminated, in 1938.

Although the available legislative history of the 1938 amendment has been much belabored by the parties to this action, several salient points merit emphasis. First, § 506 of the original Act was in no respect ambiguous on the subject of permanent trade restriction release: The final clause of the first sentence of that section explicitly sanctioned unrestricted domestic trade upon a secured agreement to make full repayment of the unamortized subsidy. Second, the glaring ambiguity of that section was its failure to mandate a proportionate CDS repayment in return for temporary domestic trade by a CDS vessel. Third, the plain thrust of the 1938 amendments to § 506—as reflected in the Kennedy remarks and the House and Senate Reports—was to assure that the statute expressly required a partial repayment for all forms of domestic trade in which a vessel that retained its subsidy might participate, thus resolving the extant ambiguity. Fourth, the history contains no mention of the perceived effect of the amendment on the power at issue here. Fifth, the unsubsidized operators who testified in 1938 showed no recognition that the amendment might afford them the permanent freedom from competition with CDS-built vessels that the respondents here seek to extract from it.

Given the clear language and history of the original § 506, which expressly sanctioned the action challenged here, it appears implausible that Congress would have acted to withdraw that authority without comment. The absence of discussion of the subject, coupled with

the expressed intent to effectuate no fundamental change, strongly indicates that Congress in 1938 simply did not focus upon the issue presented here. The vacuum of legislative intent on the subject provides no tenable basis for the conclusions urged by the respondents. The only conclusion that can fairly be drawn from this history is that Congress removed the language without disapproving the authority otherwise discernible from the current Act and supported by prior and subsequent expressions of legislative intent.

E. The Purposes and Policies of the Act

The principal briefs filed by the petitioners and the federal parties demonstrate the congruity between the Secretary's 1977 STUYVESANT decision and the Act's fundamental objectives of fortifying and maintaining an efficient national merchant marine: The Secretary's approval of the repayment and release transaction deployed needed tonnage to the Alaskan oil trade, provided employment for an otherwise unmarketable vessel, protected the government against a significant potential liability, and assisted the maintenance of a domestic shipyard. The original briefs explain additionally that the CDS repayment satisfies the fairness concerns reflected in § 506, and finally note the lack of statutory authority or factual support for the proposition that the unsubsidized owner relies by right on the absence of permanent competition with CDS-built vessels in the domestic trade. (Pet. Brief at 67-75; Gov't Brief at 71-75.)

Shell and Alaska Bulk nonetheless unabashedly assert a "right" to absolute freedom from permanent competition with any CDS-assisted vessel. According to the respondents, the predictability that evolves from that "right" is of such importance to the vitality of the American merchant marine that it is unaffected not only by CDS repayment but also by the circumstances of any industry, owner, shipyard or government investment. To accept these arguments would make predictability rather than fairness the cornerstone of the Act.

The inability to defend respondents' positions persuasively on fairness grounds may have necessitated their focus upon predicability. But that emphasis cannot obscure two basic flaws in the predictability argument. First, the suggestion that full CDS repayment is irrelevant to the Secretary's authority strains credulity. Since the source of the perceived unfairness and the catalyst for the § 506 restrictions is the subsidy benefit, the restoration of parity through CDS remittance is plainly pivotal to the statutory scheme. Second, while fairness was demonstrably the dominant congressional concern behind § 506, the respondents cite absolutely no statutory section or portion of legislative history that supports their assertedly immutable right of predictability.[10] Indeed

[10] The respondents seek to find support in the hearing remarks of the Assistant Secretary for Maritime Affairs on the proposed amendments to § 506 contained in H.R. 4769, 96th Cong., 1st Sess. (1979). (Shell Brief at 70-71; *see*

§ 506 of the Act vitiates the respondents' assertions: The routine temporary transfer of subsidized vessels to the domestic trade expressly countenanced by § 506 starkly contradicts the respondents' claims of freedom to plan without reference to the world of subsidy-assisted vessels.

Moreover, their predictions of the consequences of judicial affirmation of the Secretary's authority are not supportable. The power at issue here is not one that the Secretary has recently discovered, but one that her predecessors have claimed and exercised for fifteen years. The respondents thus do not have full freedom to speculate on the consequences. The validity of their predictions of an influx of CDS vessels

Alaska Bulk Brief at 85-87.) The import of the proposed amendment is not, as the respondents suggest, the extension of authority for permanent trade restriction release. It is instead, as the Assistant Secretary made clear in his remarks, the proposed "eliminat[ion of] the existing six month per year limitation on participation by CDS-built ships in the Jones Act trade . . . ." Statement of Samuel B. Nemirow, Hearings on Titles III, IV, and V of H.R. 4769 Before the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, 96th Cong., 1st Sess. 28-29 (September 5, 1979). The bill, if enacted, would permit temporary transfers of unlimited duration upon agency consent and in return for proportionate subsidy repayment. That change would clearly mark a dramatic departure from the express limitation on permissible periods of temporary domestic trading by subsidized vessels that § 506 has contained since 1936, and would potentially prompt the "influx" to which the Assistant Secretary referred. The respondents' suggestions that the comments addressed the permanent release of trade restrictions at issue here are simply misleading.

into the domestic trade, and a resultant depression of unsubsidized construction, must as far as possible be tested against the history of the last fifteen years.

To the extent that that history informs the consideration of these issues, it contradicts rather than affirms the respondents' contentions. The years since *Grace Line* have witnessed no massive entry of vessels constructed with CDS assistance into the domestic trade. Likewise, there is no evidence that the *Grace Line* decision prompted a discernible decrease in unsubsidized construction. Indeed, as the Secretary found in her reconsidered decision in this case, "neither a particular instance of a decision not to build new ships . . : nor any plan to build which was scrapped" has ever been cited by the respondents. (App. at 587).

Our original brief demonstrates that the Secretary's 1977 decision to accept full CDS repayment and release trade restrictions on the STUYVESANT satisfies every goal advanced by the Act, including the protection of unsubsidized vessels from unfair competition. (Pet. Brief at 67-75.) A purpose not found in the Act, but that advanced by the respondents here, is the permanent insulation of unsubsidized vessels from fair competition with other Jones Act vessels. The monopolistic efforts of the respondents should be rebuffed by this Court's affirmation of the Secretary's rightful authority.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court of appeals, and hold that the Merchant Marine Act, 1936 authorizes the Secretary of Commerce to amend a CDS contract to remove domestic trade restrictions on a vessel constructed with the assistance of a government subsidy in consideration for full CDS repayment.

Respectfully submitted,

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APPENDIX

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Section 506 of H.R. 8555, 74th Cong., 1st Sess. (as enacted by the House of Representatives on June 27, 1935):

SEC. 506. (a) Every vessel in respect of which a construction subsidy has been paid pursuant to this part shall be documented under the laws of the United States, and in case of construction, shall remain so documented under such laws for not less than twenty years from the date upon which the construction of such vessel is completed, or in case of reconditioning, for not less than the life expectancy of the vessel as determined by the Authority.

(b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided:

(1) In respect of the time such vessel shall be operated exclusively in coastwise trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel (after deducting from such subsidy the cost to the United States of the changes made pursuant to the provisions of section 501(b) as shown by the detailed estimates therefor submitted to the Auth-

ority, pursuant to the provisions of section 504(a), by the shipbuilder who constructed or reconditioned such vessel) as such time bears to the entire economic life of such vessel, together with interest at 4 per centum per annum on such portion of such amount as remains at any time unpaid and not overdue and when overdue, at the rate of 6 per centum per annum. Such amount shall be paid in periodic installments of such sums as the Authority may direct, except that the Authority shall require the whole of such amount to have been paid at the end of the economic life of such vessel.

(2) In respect of the time such vessel shall be operated in the joint coastwise and foreign trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel (after deducting from such subsidy the cost to the United States of the changes made pursuant to the provisions of section 501(b) as shown by the detailed estimates therefor submitted to the Authority, pursuant to the provisions of section 504(a), by the shipbuilder who constructed or reconditioned such vessel) as the gross revenues derived from the coastwise portions of such joint coastwise and foreign trade bear to the gross revenues derived from all portions of such joint trade.

All payments required to be made under this subsection shall be credited to the construction loan

fund, created by section 11, as amended, of the Merchant Marine Act, 1920 (U.S.C., Supp. VII, title 46, sec. 870).

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Any consent given by the Authority under this section for operation other than exclusively in foreign trade may be revoked by the Authority at any time.

Section 506 of the Merchant Marine Act, 1936, Pub. L. 74-835, c. 858, 49 Stat. 1999 (1936):

SEC. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall

agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year.